United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

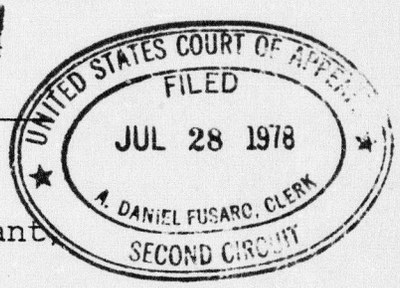
Orig. + Affidavit of Mailing

77-6202

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-6202



USHER B. WEINRAUCH,

Plaintiff-Appellant,

- against -

UNITED STATES SECRET SERVICE,
LILBURN E. BOGGS, Deputy Director,
UNITED STATES SECRET SERVICE, and
HONORABLE MICHAEL BLUMENTHAL,
UNITED STATES TREASURER,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

DAVID G. TRAGER,
UNITED STATES ATTORNEY,
Eastern District of New York.

HARVEY M. STONE,
RALPH McMURRY,
Assistant United States Attorneys,
(Of Counsel).

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (Honorable Jack B. Weinstein, J.) dated November 1, 1977, dismissing appellant's pro se complaint under the Freedom of Information Act (5 U.S.C. §552) and granting appellees' motion for summary judgment.

Appellant contends (1) that the district court, in denying disclosure of Secret Service records relating to him under the Freedom of Information Act, improperly considered the applicability to those records of disclosure exemptions other than 5 U.S.C. §552(b)(7)(A); and (2) that the court erroneously ruled that the records were exempt from disclosure under §552(b).

RELEVANT STATUTE

Exemptions under the Freedom of Information Act, 5 U.S.C. §552.

5 U.S.C. §552(b)

This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

* * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

* * *

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, * * * (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence

investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel

* * *

FACTS

A. Administrative Proceedings

On March 30, 1977, appellant wrote to the United States Secret Service requesting under the Freedom of Information Act ("FOIA") a "copy of all the files indexed or maintained under (my) name" (App. B, Attachment 1).*/ By letter dated April 6, 1977, Mr. Robert Goff, FOIA Officer of the Secret Service, advised appellant that his file was exempt from disclosure pursuant to 5 U.S.C. §552(b)(7)(A)**/ on the grounds that disclosure would interfere with ongoing enforcement proceedings (App. B, Attachment 2). That exemption applies to "investigatory records complied for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings." Mr. Goff noted that other exemptions as well might be applicable to appellant's file; he also advised appellant of his right to take an administrative appeal.

On May 9, 1977, appellant appealed this administrative ruling to Mr. Lilburn E. Boggs, Deputy Director of the Secret Service (App. B, Attachment 3). By letter dated June 15, 1977, Deputy Director Boggs denied appellant's appeal (App. B, Attachment 4). Deputy Director

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*/ "App." references are to appellant's appendix.

**/ FOIA exemptions are henceforth referred to according to their listed number in 5 U.S.C. §552(b).

Boggs determined that exemptions 1, 2, 5, 7A, 7C, 7D, 7E, and 7F authorized non-disclosure of appellant's Secret Service records and so advised appellant.

B. Proceedings in the District Court

Appellant then commenced an action pro se on July 19, 1977, in the United States District Court for the Eastern District of New York pursuant to the FOIA, demanding that the court direct the Secret Service to produce the withheld documents. Appellees answered the complaint and then moved for summary judgment on October 4, 1977. In support of their motion for summary judgment, appellees submitted affidavits by Deputy Director Boggs and James Mastrovito, Special Agent in Charge of the Intelligence Division in the Secret Service.*/

The affidavit of Deputy Director Boggs set forth in detail each of the FOIA exemptions claimed and the reasons why each exemption was applicable. Deputy Director Boggs asserted that all records concerning appellant were exempt from disclosure by exemption 7A. The Deputy Director stated that investigation of appellant was active; that the Service attempts to ascertain appellant's location during the visit of certain Secret Service protectees to the United States; that appellant has shown interest toward certain Secret Service protectees, requiring

*/ Appellant's Appendix sets forth Boggs' affidavit, but not Mastrovito's.

the conducting of in-depth investigations; and that these investigations could be compromised by disclosure (App. B, para. 4.).

Deputy Director Boggs also averred that disclosure of certain information in the file was exempt from disclosure under exemption 7E, which applies when the production of records would "disclose investigative techniques and procedures", in that disclosure would reveal criteria used by the Service in determining what individuals were of interest to the Service and in evaluating the potential danger of these individuals to protectees of the Service (App. B, para. 5). According to Deputy Director Boggs, the disclosure of this information would impair the ability of the Service to obtain similar information in the future and would enable appellant and others to avoid discovery of this information. Deputy Director Boggs asserted that the criteria sought to be withheld were unknown to the public.

With respect to exemption 7D, Deputy Director Boggs stated that the file contained "confidential sources" of information, revelation of which could adversely affect the flow of information in the future from confidential sources as well as result in possible harassment or intimidation of the sources by appellant (App. B, para. 6).

Deputy Director Boggs further asserted that portions of the file were non-disclosable under exemption 7C in that the release of certain names in the file would constitute an unwarranted invasion of the privacy of those

individuals or their families (App. B, para. 7). Exemption 7F was asserted to protect the identity of Secret Service agents involved in appellant's investigation (App. B, para. 8). Deputy Director Boggs asserted that disclosure of the names of the agents would reduce their effectiveness and might expose them to danger and asserted further that appellant had a history of intimidating or harassing protectees of the Service.

Deputy Director Boggs also asserted exemptions 2 and 5 as authorizing non-disclosure (App. B, paras. 7, 10). With respect to exemption 5, Mr. Boggs averred that the file contained agency opinions, evaluations and recommendations concerning the status of the investigation and steps to be taken in the investigation; disclosure, he observed, would thus impair the effectiveness of the Secret Service in the performance of its duties. Exemption 2 was claimed with respect to certain administrative markings in the file.

Finally, Deputy Director Boggs asserted that fifteen documents in the file were exempt from disclosure under exemption 1 in that the documents were classified under criteria established by Executive Order 11652 in the interest of national defense and foreign policy (Appendix B, para. 11). Special Agent James Mastrovito stated in his affidavit that he was authorized to make classifications pursuant to Executive Order 11652 and had so classified fifteen documents in appellant's records. Mastrovito further stated that disclosure of these documents would destroy important intelligence sources and accordingly impair the effectiveness of the Secret Service.

A hearing was held on appellees' motion for summary judgment on October 21, 1977. Without passing on the sufficiency of defendants' affidavits, the district court examined in camera the Secret Service records relating to appellant. Following in camera inspection, the district court ruled that the entirety of the records was exempt from disclosure and ordered the records sealed.*/ The district court ruled that the file contained investigatory records compiled for law enforcement purposes, disclosure of which would interfere with possible law enforcement proceedings in the future. The court also found that disclosure would reveal investigative techniques and procedures and the identity of possible confidential sources of information, and might affect the foreign policy and foreign relations of the country. In this regard the court concluded that the file was:

> "properly compiled by the Secret Service in its obligation to protect representatives of foreign countries present in this country and visiting officials from foreign countries in the past and possibly in the future." (App. C, p. 9).

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*/ Since the records here have been examined by the district court in camera and are sealed for this Court's review, the sufficiency of the affidavits are not in issue in this case, although obviously the district court's decision to exempt from disclosure militates in favor of a conclusion that the affidavits were accurate. Cf. Mead Data Central, Inc. v. Dept. of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). It should be noted that the records submitted in camera were unmarked and unredacted since defendants maintained below that exemption 7A was applicable to all the records. In their motion papers defendants specifically requested an opportunity to mark those portions for which other exemptions were asserted in the event the district court considered exemption 7A inapplicable.

The district court entered its judgment on November 1, 1977. A document filed six days earlier by appellant, on October 25, 1977, was ordered by the district court to be treated as a Notice of Appeal.

POINT ONE

THE DISTRICT COURT, IN DENYING APPELLANT'S REQUEST FOR DISCLOSURE OF SECRET SERVICE RECORDS UNDER THE FREEDOM OF INFORMATION ACT, WAS NOT PRECLUDED FROM RELYING ON EXEMPTIONS OTHER THAN 5 U.S.C. §552(b)(7)(A).

Appellant urges that the district court's ruling should be "peremptorily" reversed in so far as it relies on exemptions other than exemption 7A. The basis of this argument is that (1) 5 U.S.C. §552(a)(6)(A)(i) requires the agency to give reasons for its decision within 10 days of a FOIA request and (2) exemption 7A is the only exemption cited by Secret Service FOIA Officer Goff in his initial denial of appellant's FOIA request.

This argument is utterly without merit. Nothing in the FOIA remotely suggests that an agency waives assertion of an exemption at the appellate administrative level by not explicitly raising the exemption at the initial administrative stage. The ten-day rule is simply an attempt by Congress to force agencies to process FOIA requests promptly. See Mezines, Stein, & Gruff, Administrative Law, Vol. II, §11.02(2) (Mathew Bender, 1977) (hereafter "MSG"). The only consequence for failure of an agency to observe the ten-day rule is that administrative remedies are deemed exhausted. The requestor may then seek judicial review without further administrative proceeding. 5 U.S.C. §552(a)(6)(c). There is absolutely nothing in the FOIA to suggest that reasons given at the administrative appellate level must parallel reasons given at the initial

administrative stage. Further, the regulations governing the administrative processing of FOIA requests to the Secret Service simply require the administrative appellate disposition to reflect the reasons for the decision; no restrictions are made on the reasons which may be set forth. 31 C.F.R.1.5(h). See also Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, February, 1975, p. 26 (denial letters on appeal should give reasons for affirmance "which may be merely 'the reasons stated in the denial' if that is the case" [emphasis added]). Finally, the district court undoubtedly has the power to consider the applicability of all exemptions whether or not urged by an agency since the statute gives the district courts a mandate to determine the matter de novo and authority to examine the records in camera to determine whether records shall be withheld under any of the exemptions of 5 U.S.C. §552(b). 5 U.S.C. §552(a)(4)(B). Not surprisingly, appellant cites no authority of any kind to support his argument to the contrary.

POINT TWO

THE DISTRICT COURT PROPERLY HELD THAT APPELLANT'S SECRET SERVICE RECORDS WERE EXEMPT FROM DISCLOSURE UNDER 5 U.S.C. §552(b)

Appellant argues that the district court improperly held Secret Service records in question exempt from disclosure under the Freedom of Information Act. The argument is without merit. All of appellant's records were properly ruled exempt from disclosure on a number of grounds, which are discussed seriatim below.*/

Exemption 7A

Appellant's main argument on this appeal is that exemption 7A, asserted by defendants to authorize non-disclosure as to all Secret Service records concerning appellant, is inapplicable in this case. Appellant does not dispute that the United States Secret Service is a law enforcement agency with law enforcement purposes and responsibilities. Nor does appellant dispute that the records of the United States Secret Service relating to appellant are investigatory records; that the investigation of appellant by the Secret Service is an active and continuing one; or that disclosure of the Secret Service records

*/ The district court did not specify which subdivisions of 5 U.S.C. §552(b) it relied on in reaching its decision. However, it is clear from the district court's oral statements at the hearing on October 21, 1977, that it relied at least on exemptions 7A, 7D, and 7E (App. D). The District Court's reference to foreign policy also suggests that it may have been relying on exemption 1. See pp. 12-24, infra.

would compromise this investigation. Rather, appellant argues that exemption 7A does not exempt these records simply because the Secret Service has not pointed to any particular prospective or pending enforcement proceeding with which disclosure might now interfere. This argument (1) ignores that fact that the Secret Service investigation is itself an "enforcement proceeding" within the meaning of the statute and (2) overlooks significant legislative history behind the 1974 amendments to the FOIA.

The Secret Service's investigation of plaintiff is itself precisely the type of enforcement proceeding to which exemption 7A was intended to apply. The Secret Service has the important function of providing protection for statutorily defined classes of protectees, including certain foreign diplomats. 18 U.S.C. §3056. Further, the United States as a member of the family of nations has an obligation under ancient and basic principles of international law to afford protection to foreign officials on its territory.*/ The discharge of this important protective function is necessarily preventive in nature and necessarily involves a continual monitoring of persons with known interest in Secret Service protectees.

As the affidavit of Secret Service Deputy Director Boggs (App. B, para. 4) indicates, and as the District Court necessarily must have concluded after in camera inspection, the investigation of appellant is an

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*/ See generally Sorenson, Manual of Public International Law (London, 1968), §9.14; Article 29, Vienna Convention on Diplomatic Relations; Article 40, Vienna Convention on Consular Relations.

active and continuing one. The Boggs affidavit further avers that appellant has shown an interest in certain protectees of the Secret Service; that as a result in-depth investigations have been required including interviews or attempted interviews with appellant; and that the Secret Service attempts to determine appellant's location during the visit of certain protectees to the United States. The Deputy Director of the Secret Service further asserted that appellant in the past has attempted to intimidate or harass protectees of the Secret Service (App. B, para. 8). Significantly, the Deputy Director claimed too that disclosure would permit appellant to avoid certain aspects of investigations in the future (App. B, para. 4). The district court found after in camera inspection that the records here were "properly compiled by the Secret Service in its obligation to protect representatives of foreign countries present in this country and visiting officials from foreign countries in the past and possibly in the future." Plainly these are the very circumstances exemption 7A was intended to reach; it is obvious that to disclose investigatory records to the very subject of investigation could compromise the investigation in a myriad of possible ways.

Appellant apparently believes that the phrase "enforcement proceeding" in exemption 7A refers to a formal proceeding of some kind before a court or other tribunal and that such a proceeding must be pending or at least contemplated before exemption 7A can be invoked. Indeed, appellant's statement of the issues in this case (Br., p.2) refers specifically to a criminal proceeding.

Although the statute does not so define "enforcement proceedings", appellant purports to find such a definition in a reference by Senator Hart, a sponsor of the 1974 FOIA amendments, to a "concrete prospective law enforcement proceeding" (Br. p. 8). 120 Cong. Rec. S9330 (May 30, 1974).

This language of course does not define "enforcement proceeding" but simply qualifies it. For further enlightenment as to the meaning of this term it is necessary to examine the legislative history of exemption 7A. Far from supporting appellant's narrow concept of the term "enforcement proceeding", the pertinent legislative history of exemption 7A, completely overlooked by appellant, demonstrates clearly that the language of exemption 7A is to be given flexible and broad interpretations sensitive to the circumstances of particular situations and to legitimate law enforcement interests.

In a recent and thorough canvass of the legislative history of exemption 7A, the Supreme Court of the United States in a case involving unfair labor practice proceedings before the National Labor Relation Board found that the "thrust of congressional concern in its amendment of Exemption 7 was to make clear that the exemption did not endlessly protect material simply because it was an investigatory file." NLRB v. Robbins Tire & Rubber Co., 46 U.S.L.W. 4689, 4694 (June 15, 1978). Prior to 1974, exemption 7 simply exempted from disclosure "investigatory files compiled by law enforcement purposes except to the extent available by law to a party other than an agency."

This provision was broadly construed in a series of District of Columbia Circuit cases,*/ the result of which was to extend the exemption to any material that was part of an investigatory file, even as to investigations that were already concluded, without any necessity of showing any particular injury to the government due to release of a particular record.

Congress amended exemption 7 in 1974 in order to limit this broad and mechanical construction of the exemption by revising the statute so as to limit non-disclosure to six specific instances of harm to governmental or individual interests. See NLRB v. Robbins Tire & Rubber Co., supra, 46 U.S.L.W. at 4695; NLRB v. Sears Roebuck & Co., 421 U.S. 132, 165 (1975); 2 MSG §10.08, p. 10-175 et seq.; Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, pp. 4 et seq. (hereafter "Attorney General's Memorandum"); 1974 U.S. Code and Adm. News, pp. 6267 et seq.; 120 Cong. Rec. S9330 (remarks by Senator Hart). Thus, the primary purpose of the 1974 amendments was not to limit mechanically or indiscriminately the availability of exemption 7, but rather simply to identify and clarify the governmental and individual interests authorizing non-disclosure. In this connection, Senator Hart declared that the amendments were:

> "by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the

*/ These cases are discussed in detail by the Supreme Court in NLRB v. Robbins Tire & Rubber Co., supra, 46 U.S.L.W. at 4693.

> courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information...." 120 Cong. Rec. S9330. [emphasis added]

Plainly Congress was concerned that reasons, not labels, be the key to non-disclosure. See also 120 Cong. Rec. S9330 (May 30, 1974) (remarks by Senator Kennedy). The amendments accomplished this result by specifying particular governmental interests thought to justify non-disclosure.

In the task of identifying and classifying these interests in a particular case, the legislative history makes abundantly clear that, despite the FOIA's basic policy favoring disclosure, the language of the exemption 7 subdivisions are to be broadly contrued. See Attorney General's Memorandum, p. 8. According to Senator Hart, these subdivisions were to be interpreted in a flexible manner. 120 Cong. Rec. S19812 (Nov. 21, 1974). The Senator stressed that the amendment was "broadly written" with the objective of balancing public access to information while safeguarding legitimate governmental interests in nondisclosure. 120 Cong. Rec. S9330 (May 30, 1974). It was recognized that in this balancing process the amended exemption might even make documents less available to citizens than under the original exemption. See 120 Cong. Rec. S9336 (May 30, 1974) (remarks by Senators Hart

and Kennedy). Of special significance to this case is Senator Hart's statement, in the context of FBI records, that the amendments would permit non-disclosure of records if disclosure would threaten the ability to conduct an investigation "in any (other) way". 120 Cong. Rec. §9337 (May 30, 1974) (letter of Senator Hart) [emphasis added].

The legislative history as well as other authority give specific guidance as to the intended breadth with which the language of each of the operative phrases in exemption 7A are to be interpreted. With respect to the term "enforcement proceedings" at issue here, one authority states that its scope is broad, corresponding generally to "law enforcement purposes", whether criminal, civil, or administrative (Attorney General's Memorandum, p. 7). In explaining this clause of his amendment, Senator Hart made clear that he considered proceedings interfered with when investigations preliminary to them are interfered with. 120 Cong. Rec. S9330 (May 30, 1974). Significantly, Senator Hart at one point also identified "enforcement proceedings" as synonymous with "enforcement procedures" in describing the scope of the clause. Id. Thus, according to the Attorney General's Memorandum (p. 7), records of a pending investigation of an applicant for a Government job could be withheld under exemption 7A to the extent their production would interfere with the investigation. The analogy to this case is plain.*/

*/ Most reported cases interpreting exemption 7A involve unfair labor practice enforcement proceedings before the National Labor Relations Board. In this context the

Footnote continued on next page

Similarly, other components of exemption 7a are broad in scope. Thus, "investigatory records" are those which reflect or result from investigative efforts, which may include not only activities in which the agency (Secret Service) takes the initiative, but also the receipt of complaints or other communications indicating possible violations of law, where such receipt is part of an overall program to prevent, detect, or counteract such violations, or leads to such an effect in the particular case. Attorney General's Memorandum, p. 6.

The meaning of the word "interfere" in exemption 7A turns upon the facts and context of each case. Interference may occur when the government's case in pending or prospective litigation would be harmed by the premature release of information not in the possession of known or potential defendants, or would alert the subject that an investigation is underway. See 120 Cong. Rec. S9330 (May 30, 1974) (remarks by Senator Hart): Attorney General's Memorandum, pp. 7-8; 2 MSG §10.08(4). Again, of special significance to this case is Senator Hart's letter

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*/ Footnote continued from previous page

meaning of "enforcement proceedings" is self evident and clearly distinguishable from Secret Service operations. See NLRB v. Robbins Tire & Rubber Co., supra, 46 U.S.L.W. at 4690-4691 (and cases cited therein). Significantly, the Supreme Court in NLRB v. Robbins Tire & Rubber Co., supra, took pains to point out that in FOIA cases the courts were not precluded from considering "whether 'particular' types of enforcement proceedings * * * will be interfered with by particular types of disclosure." NLRB v. Robbins Tire & Rubber Co., supra, 46 U.S.L.W. at 4695 (first emphasis in original, second emphasis added).

asserting that the amendments would authorize non-disclosure of records if disclosure threatened the ability to conduct an investigation "in any (other) way". 120 Cong. Rec. S9337 (May 30, 1974) [emphasis added]. Finally, as noted above, interference may occur if investigations preliminary to a proceeding would be impaired by disclosure. 120 Cong. Rec. S9330 (remarks by Senator Hart).

The meaning of the word "would" (preceding "interfere") in exemption 7A implies only a reasonable possibility, not a certainty, that interference with an enforcement proceeding would occur as a result of disclosure. Attorney General's Memorandum, p. 13. Finally, it is plain and uncontested here that the Secret Service has "law enforcement" responsibilities, functions, and purposes. The Secret Service has law enforcement responsibilities with respect to a broad category of offenses, including offenses against protectees of the Service. See 18 U.S.C. §§112, 871, 3056. Law enforcement and investigative efforts relate to the prevention and detection of offenses as well as the prosecution of consummated offenses. Attorney General's Memorandum, p. 6.

Applying all these broad principles of interpretation to the case at bar, it is plain that the Secret Service records are exempt from disclosure under exemption 7A. There is simply no indication in the legislative history of the 1974 FOIA amendments that Congress intended such records to be disclosed. On the contrary, the legislative history discussed above reveals a Congressional intent to apply the exemptions flexibly and sensitively to

the context of particular circumstances for the purpose of protecting legitimate law enforcement interests. The legislative history and other authorities make clear that these interests include law enforcement objectives of detection and prevention which are paramount in this case.*/

Assuming arguendo there is any merit to the proposition that "enforcement proceeding" refers in all cases to some type of specifically contemplated or actually pending formal proceeding before a court or some other tribunal, the district court's order must still be affirmed. Senator Hart's reference, in a passage quoted by appellant (Br. p. 8), to "concrete prospective law enforcement proceeding" (120 Cong. Rec. S9330 (May 30, 1974)) certainly is not inconsistent with and indeed closely parallels the district court's view that disclosure is not required

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*/ Of great significance in the legislative history are Senator Hart's illustrations of the types of information which the 1974 amendments were intended to make available to the public: meat inspection reports, civil rights compliance information, medicare nursing home reports; investigations of harmful childrens toys, investigations of automobile defects, and investigations of a multitude of federally funded activities. See 120 Cong. Rec. S9330 (remarks of Senator Hart); 120 Cong. Rec. S9337 (letter of Senator Hart). This case obviously does not fall within any of these categories. The spirit of the amendments plainly favors non-disclosure in the present circumstances. Appellant's analysis, on the other hand, calls for the Freedom of Information Act to be interpreted "woodenly and mechanically" (remarks of Senator Kennedy, 120 Cong. Rec. S9331) (May 30, 1974), the very result that Congress in passing the 1974 amendments was anxious to avoid.

where, as here, it might interiere with "possible law enforcement proceedings in the future".*/ This conclusion is buttressed by the Senator's expression of concern in the same passage about "the premature release of evidence or information not in the possession of known or potential defendants (id.)" [emphasis added].

In National Public Radio v. Bell, 431 F. Supp. 509, (D. D.C. 1977), the court ruled that exemption 7A authorizes non-disclosure of Department of Justice records involving a "dormant" but "active" criminal investigation which "hopefully" would lead to a "prospective law enforcement proceeding". National Public Radio v. Griffin Bell, 431 F. Supp. 509, 514 (D. D.C. 1977). The Court reasoned that these circumstances differed markedly from the cases the 1974 amendments were intended to overrule. The identical principle applies in this case and compels affirmance of the district court's ruling.

Exemptions 7D and 7E

Appellant does not contest the bona fides of appellees' assertion of exemptions 7D and 7E or the correctness of the district court's finding that they authorized non-disclosure in this case. Rather, appellant argues that since appellees asserted these exemptions as to only portions of the Secret Service records concerning appellant, those records should be redacted to eliminate those

*/ As noted (p. 9, supra), the court found after in camera inspection that disclosure might have this effect.

portions of the records to which these exemptions pertain. The district court did not state that these exemptions authorized non-disclosure as to only portions of appellant's records; it spoke only of the production and revealing of the "record". Accordingly, it is fair to assume that the district court was referring to the entirety of appellant's records in holding that exemptions 7E and 7D authorized non-disclosure. This the district court could do since its mandate was to determine the matter de novo and decide whether such records or any part thereof should be withheld under any of the FOIA exemptions. 5 U.S.C. §552(a)(4)(B). If there is any doubt as to the matter, and assuming arguendo exemption 7A is found not to authorize non-disclosure of the Secret Service records involved here, appellees are entitled to a remand for purposes of obtaining specific findings as to the applicability of these exemptions to the pertinent portions of the records.

Exemption 1

The district court's statement that disclosure may affect foreign policy and foreign relations suggests that it was relying on exemption 1, especially in light of appellees' contentions below that fifteen documents were properly exempt from disclosure under this exemption. Appellant is simply incorrect in his assertion (Br. pp. 10-11) that foreign policy considerations may not authorize non-disclosure under the FOIA.*/ Assuming arguendo

*/ Assuming arguendo appellant is correct on this point, it does not follow that disclosure is required as appellant claims. Although there is a split of authority on

Footnote continued on next page

that exemptions 7A, 7D, and 7E are found not to authorize non-disclosure, appellees are entitled to a remand for purposes of obtaining specific findings as to the applicability of exemption 1 to the pertinent portions of the requested records.

Exemptions 2, 5, 7C, and 7F

The district court did not pass on defendants' assertion of exemptions 2, 5, 7C and 7F. In view of the court's ruling that other exemptions authorized non-disclosure of appellant's records, there was of course no need to reach the applicability of these exemptions. In the event that exemptions 7A, 7E, and 7D are found not to authorize non-disclosure of appellant's records, defendants are entitled to a remand for purposes of obtaining specific findings as to the applicability of exemptions 2, 5, 7C and 7F.

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*/ Footnote continued from previous page

the subject, some courts have held that the courts have equitable discretion to decline to order disclosure of documents even though none of the nine exemptions apply. See Halperin v. Department of State, 565 F.2d 699 (D.C. Cir. 1977); Consumers Union of United States v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed, 436 F.2d 1363 (2d Cir. 1971); 2 MSG §11.02(3)(c).

CONCLUSION

The order appealed from should be affirmed. Assuming arguendo that the exemptions relied on by the district court do not authorize non-disclosure of all requested Secret Service records, appellees are entitled to a remand for the purpose of obtaining specific findings as to the applicability of asserted exemptions to pertinent portions of the records.

Dated: Brooklyn, New York
July 26, 1978

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
RALPH McMURRY,
Assistant United States Attorneys,
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

ELLA L. HILL being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 28th day of July 1978 she served a copy of the within

BRIEF FOR DEFENDANT-APPELLEE (CORRECTED COPIES)

by placing the same in a properly postpaid franked envelope addressed to:

JEFFREY I. ZUCKERMAN, ESQ.
Attorney for Appellant
125 Broad Street
New York, New York 10004

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Ella L. Hill
ELLA L. HILL

Sworn to before me this
28th day of July 1978

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1979